Sinwara Sdn Bhd v Maris Housing Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6(S2)-24-3114 OF 2001
ABDUL WAHAB J
23 APRIL 2003

Land Law *— Management corporation — Management fees — Management corporation empowered to issue notice to increase management fees after issuance of strata title — Notice to increase management fees issued by management corporation before issuance of strata title — Whether such notice valid*

Legal Profession *— Duty to client — Conflict of interests — Counsel having an interest in the litigation — Counsel not a party to the litigation — Whether counsel had locus standi to appear — Whether counsel should be barred from representing client*

The first defendant was the developer of Kompleks Desa Kepong ('the said development'). The second defendant was the management corporation of the said development. The plaintiff was the purchaser of Lot 4.06 in the said development. Clause 17 of the sale and purchase agreement ('the agreement') provided, inter alia, that the defendants could impose a management fee. By a notice dated 28 October 1994, the first defendant increased the management fee on the grounds that the plaintiff's space was commercial. The plaintiff paid. On 27 September 1996, the second defendant issued a notice to further increase the management fee. The plaintiff applied for a declaration to the effect that the defendants could not increase the management fees. When the application came up for hearing, the defendants objected to the appearance of initial counsel for the plaintiff — Mr Lee Seng Wai, on the ground that Mr Lee owned one of the lots in the said development and was therefore an interested party and had a pecuniary interest. The objection was raised under rr 3, 4, 5 and 27 of the Legal Profession (Practice & Etiquette) Rules 1978.

Held, allowing the objection, barring Mr Lee Seng Wai from representing the plaintiff and dismissing the application with costs:

(1) If counsel were in an objective position, courts would have a greater confidence in the sincerity and candour of the assessment of facts by counsel. Such an objective counsel was in fact in a better position to represent his client's interest to obtain a fair and just decision. Failure to act in an objective manner would contribute substantially to confusing the issues and lead to lengthy and expensive litigation resulting in a decision that is less right, fair and just. In the instant case, Mr Lee Seng Wai being in the same position as the plaintiff had an interest in the result. Whilst he could have represented himself in which case he would not be acting as an advocate and solicitor, in the instant case, he was not a plaintiff and hence had no locus standi. The fact that there was no injustice shown was irrelevant as the objection was not merely

procedural but was one that went to the heart of the justice system. Mr Lee Seng Wai should therefore be barred from representing the plaintiff and directed to inform his client to obtain another counsel (see pp 774G–775A). A

(2) Under the agreement, the purchaser was to pay management fees pending issuance of the strata title. Until the strata title is issued, only the first defendant had the right to increase the fee. After issuance of the strata title, the second defendant could issue the notice. On the facts, the strata title was issued on 9 June 2000. The notice by the second defendant was issued on 27 September 1996. The first defendant clearly did not issue this notice. Nothing in the notice stated that it was issued on behalf of the first defendant. There was also no evidence of the second defendant's authority to do so. Thus it had to be concluded that at the date of the notice, the second defendant did not have power to issue a valid notice. The prayer for a declaration that the first defendant did not have power to increase the management fee was in the circumstances unsupportable (see p 776A–D).] B C D

[Bahasa Malaysia summary

Defendan pertama adalah pemaju Kompleks Desa Kepong ('pembangunan tersebut'). Defendan kedua adalah perbadanan pengurusan pembangunan tersebut . Plaintif adalah pembeli Lot 4.06 dalam pembangunan tersebut. Klausa 17 perjanjian jualbeli ('perjanjian tersebut') memperuntukkan, inter alia, bahawa defendan-defendan boleh mengenakan fee pengurusan. Melalui satu notis bertarikh 28 Oktober 1994, defendan pertama telah menaikkan fee pengurusan tersebut atas alasan bahawa ruang plaintif adalah komersial. Plaintif telah membayar. Pada 27 September 1996, defendan kedua telah mengeluarkan satu notis untuk selanjutnya menaikkan fee pengurusan. Plaintif telah memohon untuk satu deklarasi berikutan itu supaya defendan-defendan tidak boleh menaikkan fee-fee pengurusan. Apabila permohonan dibicarakan, defendan-defendan telah membantah terhadap kehadiran peguam pertama bagi pihak plaintif — Encik Lee Seng Wai, atas alasan bahawa En Lee memiliki salah satu daripada lot-lot dalam pembangunan tersebut dan oleh demikian satu pihak yang berkepentingan dan mempunyai kepentingan wang. Bantahan tersebut telah ditimbulkan di bawah kaedah-kaedah 3, 4, 5 & 27 Kaedah-Kaedah Profesyen Guaman (Amalan dan Etika) 1978. E F G H

Diputuskan, membenarkan bantahan tersebut, menghalang En Lee Seng Wai daripada mewakili plaintif dan menolak permohonan dengan kos:

(1) Jika peguam dalam kedudukan yang positif, mahkamah mungkin mempunyai keyakinan yang lebih terhadap keikhlasan dan sikap terus terang penilaian-penilaian fakta-fakta oleh peguam. Dengan I

objektif sedemikian, peguam pada hakikatnya berada dalam kedudukan yang lebih baik untuk mengemukakan kepentingan anakguam beliau bagi memperoleh satu keputusan yang asil. Kegagalan untuk bertindak dengan sikap positif akan menyebabkan persoalan-persoalan yang mengelirukan dan membawa kepada litigasi yang berlarutan dan mahal yang menghasilkan satu keputusan yang tidak betul dan adil. Dalam kes semasa, En Lee Seng Wai yang berada dalam kedudukan yang sama seperti plaintif mempunyai satu kepentingan dalam keputusan tersebut. Walaupun beliau boleh mewakili diri sendiri di mana beliau tidak akan bertindak sebagai seorang peguambela dan peguamcara, dalam kes semasa, beliau bukan plaintif dan justeru itu tidak mempunyai locus standi. Hakikat bahawa tiada ketidakadilan ditunjukkan adalah tidak relevan kerana bantahan tersebut bukan hanya prosedural tetapi suatu yang penting dalam system keadilan. Encik Lee Seng Wai should therefore be barred from representing the plaintiff and directed to inform his client to obtain another counsel (lihat ms 774G–775A).

(2) Di bawah perjanjian tersebut, pembeli dikehendaki membayar fee-fee pengurusan sementara menunggu pengeluaran hak milik strata. Sehingga hak milik strata dikeluarkan, hanya defendan pertama mempunyai hak untuk menambahkan fee tersebut. Setelah pengeluaran hak milik strata, defendan kedua boleh mengeluarkan notis tersebut. Berdasarkan fakta-fakta tersebut, hak milik strata telah dikeluarkan pada 9 Jun 2000. Notis oleh defendan kedua telah dikeluarkan pada 27 September 1996. Defendan pertama dengan jelas tidak mengeluarkan notis ini. Tiada apa-apa dalam notis tersebut yang mneyatakan bahawa ia telah dikeluarkan bagi pihak defendan pertama. Tiada juga keterangan tentang kuasa defendan kedua untuk berbuat demikian. Oleh itu ia diputuskan bahawa pada tarikh notis tersebut, defendan kedua tidak mempunyai kuasa untuk mengeluarkan notis yang sah. Permohonan untuk satu deklarasi bahawa defendan pertama tidak mempunyai kuasa untuk menambhakan fee pengurusan dalam keadaan sedemikian tidak disokong (lihat ms 776A–D).]

Robert Muniandy (*R Murugan* with him) (*Murugan & Co*) for the plaintiff.

Christine Lim (*Shariff & Som*) for the defendants.

Notes

For cases on conflict of interests, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1606–1612.

For cases on management corporations generally, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2780–2786.

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 ss 3, 4, 5, 27
Strata Titles Act 1985 s 45(3)(a)

Abdul Wahab J:

The preliminary objection

When this case came for hearing on 1 November 2002, counsel for defendants objected to the appearance of counsel for the plaintiff upon the ground that the latter is an owner of one of the lots and is therefore an interested party and has a pecuniary interest. The court was informed that this objection had been brought up before managing judge who directed counsel to raise the objection before this court.

The objection was raised under rr 3, 4, 5 and 27 of the Legal Profession (Practice and Etiquette) Rules 1978. The purpose of the rule is to ensure that counsel appearing before the courts can argue objectively; thereby being able to assist the courts to arrive at a fair and just decision. If counsel were in an objective position, courts can have a greater confidence in the sincerity and candour of counsel's assessment of the facts. Such an objective counsel is in fact in a better position to represent his clients' interest to obtain a fair and just decision.

Much of the confusion arises from the thinking that it is the litigant's interest to win his case. This leads to the thinking that, that in the performance of his duty to his client, a lawyer must advance every possible argument of his client so that the latter can win. But since there are two parties who want to win and there can only be one right, fair and just decision, the fallacy of that thinking is obvious. This apparent conundrum is resolved however if it is understood that the only interest of all the parties that is recognized is the interest in a right, fair and just decision. If counsel conducts his case on that basis, then he is of assistance to his client and the court. It is for this reason that the legal profession is founded as a learned and honourable profession. Indeed, failure to act in an objective manner contributes substantially to confusing the issues, making litigation more lengthy and expensive and resulting in a decision that is less right, fair and just than it could have been.

Being in the same position as the plaintiff, counsel has an interest in the result. While Mr Lee Seng Wai could have represented himself, in such a case he would not be acting as an advocate and solicitor, and the fact would be obvious to the court. In any case, he is not a plaintiff in this case and therefore has no locus standi.

While an expeditious disposal of the matter before me would require rejection of the objection, the court is of the view that where an objection is raised or such objection otherwise comes to the knowledge of the court, the above principles rise above mere convenience and speed. The fact there is no injustice shown is irrelevant as the objection is not a mere procedural objection but is one that goes to the heart of the system of justice.

The objection was therefore allowed. Counsel Mr Lee Seng Wai was barred from representing the plaintiff and directed to inform his client to obtain another counsel, and the parties were ordered to obtain a fresh hearing date from the managing judge.

The application

The application at encl 1 came up for hearing on 26 November 2002.

The application by the plaintiff is for a declaration that the defendants cannot increase the management fee under cl 17 of the sale and purchase agreement on 14 May 1993 between the parties in respect of Lot 4.06 Kompleks Desa Kepong.

The first defendant was developer of Kompleks Desa Kepong. The plaintiff is the purchaser of Lot 4.06. The second defendant is the management company. Under cl 17(1) of the sale and purchase agreement, it is provided that the defendant could impose a management fee. The management fee imposed was 35 cents per sq ft for office space and 60 cents per sq ft for trading space.

By notice dated 28 October 1994, the first defendant increased the management fee applicable to the plaintiff's premises from 35 cents to 60 cents on the grounds that the plaintiff's space is commercial. The plaintiff paid.

On 27 September 1996, the second defendant issued a notice to increase the management fee from 60 cents to 90 cents.

The issue before the court

The issue placed before the court is whether the second defendant has the right to increase the management fee, and if so, whether the plaintiff must pay before the strata title is issued.

Plaintiff's case

In brief, the plaintiff's case is that the first defendant failed to comply with the sale and purchase agreement, and the second defendant has no power to increase the management fee. Counsel urged that cl 17(b) of the sale and purchase agreement be given its natural and ordinary meaning.

Defendants' case

It was argued for the defendants that nothing in the Strata Titles Act 1985 prohibits the defendants from increasing the management fees. It was submitted that cl 17(b) is consistent with s 45(3)(a) of the Act, and gives the first defendant as vendor an absolute discretion to increase the management fees.

Finding

Applying the literal and ordinary meaning, cl 17(b) provides that the purchaser is to pay management fees per the Third Schedule pending issuance of the strata title. This specific provision in cl 17(b) therefore qualifies and overrides the more general cl 17(a). Until the strata title is issued, only the first defendant has the right to increase the fee. After the issue of the strata title, second defendant may issue the notice.

The strata title was issued on 9 June 2000. The notice by the second defendant was issued on 27 September 1996. The first defendant did clearly not issue the notice that was issued. Nothing in it states it was issued on behalf of the first defendant, and there is no evidence of the authority of the second defendant to do so. It must be concluded, therefore, that on the date of the notice the second defendant did not have the power to issue a valid notice.

Prayer 1 seeks a declaration that first defendant does not have power to increase the management fee. That prayer is in the circumstances unsupportable. The court, therefore, orders as follows:

(3) prayer 1 dismissed;

(4) prayer 2 dismissed;

(5) prayer 3 dismissed;

(6) prayer 4 dismissed;

(7) the costs is paid by the plaintiff to the defendant.

Objection allowed, barring Mr Lee Seng Wai from representing the plaintiff and application dismissed.

Reported by Andrew Christopher Simon

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